**Yuri Saunders INSOL Case Study II Assignment**

1. Dear Mr. Maximov, we have considered the instructions set out in your letter to us of 18 February 2022 seeking our advice regarding restructuring the Efwon Investments group of companies to:
   1. Quickly eliminate the insolvency and potential insolvency proceedings threatening the following companies in the group:
      1. Efwon Investments Limited (Delaware) (“Efwon Delaware”) – our instructions are that Efwon Delaware obtained loans totaling US$250M from a syndicate of banks under the following terms:
         1. secured partly on a number of homes of yours across the world collectively worth some US$73M, a pledge on projected revenue to flow back from the resulting investment in the F1 sport, a pledge over the shares of Efwon Delaware and finally a negative pledge for the entire value of the loan;
         2. to be repaid in 10 years, with an interest rate of LIBOR + 2%, and with a structure of 2 senior banks (exposure of US$100M), 2 mezzanine financial creditors (US$60) and 5 junior financial creditors holding an exposure of US$90M.
         3. the syndicate of banks have become concerned following recent events regarding other companies within the group over the last 6 months to a year and your fear is that the syndicate intends to foreclose on Efwon Delaware’s shares among other things.
      2. Efwon Trading Limited (“Efwon England”) which is an English company and a direct subsidiary of Efwon Delaware. Efwon England was advanced US$350M by Efwon Delaware to fund the F1 investment. Thus far it has used the entire UD$350M advanced to fund its subsidiary Efwon Romania. We are instructed that Efwon England is liable to a Monegasque bank in the sum of US$100M. It is presently hampered in its repayment efforts to both Efwon Delaware and the Monegasque bank by legal proceedings involving Efwon Romania.
      3. Efwon Romania, which is incorporated in Romania and is the holder of the F1 licenses, presently carries on the F1 racing enterprise, owns the constructors’ assets relevant thereto and employs the F1 drivers, Adrian Dragavei and Marian Suta (“the Drivers”). We are instructed that in the last race of the 2018 season, the Drivers were injured and having cited defects in safety and management issues have initiated claims in Romania where, if they succeed, substantial compensation is likely to be awarded against Efwon Romania. As part of their strategy and as an interim measure, lawyers acting for the Drivers have filed for the insolvency of Efwon Romania and have obtained interim freezing injunctions over the company’s assets and income. The result is that Efwon Romania is likely to default on its payment obligations to Efwon Trading due to be made in early 2019 which would cause a similar disastrous chain of events in Efwon Engand and Efwon Delaware.
   2. Develop a strategy to merge the Efwon group, while maintaining some ownership, with the Malaysian state company KuasaNas, which is likely able to offer funding exceeding US$200M annually to the F1 team. KuasaNas has proposed to sponsor the F1 team on the condition that it obtains a majority stake (at least 51%) in the F1 team and that the insolvency issues affecting the companies are dealt with promptly.
2. Given the above, in particular 1(a)(iii), the insolvency pressure brought to bear on Efwon Romania is clearly the cascade event for the Group’s sudden uncertainty. The tortious litigation concerning the Drivers is effectively what threatens Efwon England and Efwon Delaware meeting their payment obligations to their creditors prompting them to consider insolvency proceedings. The Romanian insolvency proceedings, therefore, in our view, are what ought to be dealt with firstly and quickly. After they have been resolved separate out of court arrangements may be made with Efwon England and Efwon Delaware’s creditors to effect the restructuring with KuasaNas.

**Your suggestion – United States Chapter 11 Bankruptcy Proceedings**

1. We understand that it is your preliminary view that the restructuring of the group should be effected by way of United States Chapter 11 Bankruptcy proceedings (“Chapter 11”).
2. Chapter 11 is considered to be the global tour de force in restructuring. The worldwide automatic stay from which it benefits immediately comes into effect as a plenary petition[[1]](#footnote-1) on filing and would give Efwon Delaware some breathing room to formulate a relevant plan. The plan would ultimately have to be confirmed by the Court as Chapter 11 is a very court-driven process. To be confirmed, the plan would have to, among other things:
   1. Be feasible and not rely on speculative or improbable events to be capable of execution[[2]](#footnote-2);
   2. Comply with the applicable provisions of the Bankruptcy code[[3]](#footnote-3); and
   3. Be supported in such a way that each impaired class of claims or interests and each holder of a claim or interest of such class must accept it or will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if Efwon Investments were liquidated under Chapter 7[[4]](#footnote-4).
3. Paragraph “4c” above is part of what is referred to as the “cramdown” aspect of the confirmation of the plan. To use the “cramdown” procedure, all the other requirements of confirmation set out in § 1129 must be met, and at least one impaired class must have voted to accept the plan. In addition, the plan must not “discriminate unfairly” and must be “fair and equitable” to the non-consenting impaired classes[[5]](#footnote-5).
4. Bankruptcy proceedings in the US court system, including Chapter 11, also offer the use of what is called substantive consolidation and deemed substantive consolidation in which a motion is made to the court to consolidate the assets and liabilities of several fully owned subsidiaries into their parent and into each other. In a Chapter 11 case, class voting, classification of claims, and cramdown are all adjudicated based on the combined entity and, when the corporate group emerges from Chapter 11, it does so as a single corporation[[6]](#footnote-6). The benefit of such a procedure in the present circumstances is obvious; the Efwon group, being spread over several jurisdictions but also being so closely interconnected businesswise, would benefit from being treated as one entity.
5. In the case *In re Global Ocean Carriers Limited* 251 B.R. 31 the Delaware Bankruptcy court decided that escrow funds paid to counsel by corporate entities located outside of the United States in respect of bankruptcy filings were sufficient to give the court jurisdiction over those entities in a Chapter 11 plan. There would therefore be no issue of the US Bankruptcy court obtaining jurisdiction over Efwon England and Romania in a Chapter 11 filing. All that would be required is the payment of a retainer to US counsel on behalf of those entities and jurisdiction could be established.
6. Unfortunately, the prospect of a Chapter 11 filing is very expensive. Efwon Delaware and its subsidiaries will be responsible for paying, on an ongoing basis, their post-petition business expenses, their counsel and other advisors as well as the counsel and advisors of the unsecured creditors’ committee, any other statutory committees and any other creditor who may have contractual entitlements to payment of fees in enforcement proceedings. It is rare that a debtor is able to finance the proceedings from ordinary business revenue.
7. Additionally, there will be the issue that once the US court has made an order in respect of the Chapter 11 restructuring, it must then be enforced in the relevant jurisdictions in which Efwon England and Romania are located. This is yet an additional step which carries with it an expense. Fortunately, however, there is a tried and tested way to have it done in both England and Romania, a fact which should not be taken for granted in International Insolvency proceedings, I should tell you.
8. In the present case both England and Romania have enacted in their local law the provisions of the UNCITRAL Model Law on Cross-Border Insolvency 1997 (“the Model Law”). We would advise, *if* Chapter 11 proceedings were opened and an order is made, that the US foreign representative considers seeking assistance in England and Romania in recognising the foreign representative and the insolvency order. The Model Law was adopted in 1997 and has been enacted in England almost verbatim by virtue of the Cross-Border Insolvency Regulations 2006 (“the CBIR”). It has been enacted in Romania with relatively minor changes. The aim of the Model Law is to provide a legislative framework necessary to facilitate cooperation and coordination in cross-border insolvency cases, with a view to promoting the general objectives of:

“(a) Cooperation between the courts and other competent authorities of the enacting State and foreign States involved in cases of cross-border insolvency;

(b) Greater legal certainty for trade and investment;

(c) Fair and efficient administration of cross-border insolvency pro-ceedings that protects the interests of all creditors and other interested persons, including the debtor;

(d) Protection and maximization of the value of the debtor’s assets;

(e) Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.”[[7]](#footnote-7)

1. The Model Law would permit a US foreign representative to apply to the English and Romanian courts for recognition in respect of the Chapter 11 proceedings (Article 15 of the Model Law). In the case *Re 19 Entertainment Ltd* [2016] EWHC 1545 (Ch) the English High Court granted recognition of Chapter 11 proceedings in relation to a company that was incorporated in the UK but had its centre of main interests ("COMI") in the United States, confirming that the Directors were foreign representatives for the purpose of the CBIR.
2. One proviso, however, would be that it is arguable that the Model Law (in particular, the CBIR) does not permit the recognition of foreign representatives of proceedings where the debtor is not insolvent. See for example *Carter v Bailey & Anor (Sturgeon Central Asia Balanced Fund Ltd)* [2020] EWHC 123 (Ch) (27 January 2020) in which ICC Judge Briggs decided that the purpose of the Model Law is to promote modern and fair legislation for cases where an *insolvent debtor* has assets in more than one State and that it would be contrary to the stated purpose and object of the Model Law to interpret "foreign proceedings" to include solvent debtors and more particularly actions that are subject to a law relating to insolvency which have the purpose of producing a return to members not creditors.
3. While Efwon Delaware may not necessarily be insolvent when a Chapter 11 is filed, Efwon Romania and England would be by the time a final Chapter 11 order is made and a foreign representative seeks the assistance of the courts in England and Romania to have the US order enforced. It must be assumed that by such time (at least around 3-6 months following the filing of the Chapter 11) the cash crunch caused by the insolvency proceedings in Romania would have caused a ripple effect to Efwon Engand. As insolvency proceedings would be opened in Romania and Engand in respect of the specific Efwon companies there (and not Efwon Delaware) the decision in *Carter v Bailey & Anor[[8]](#footnote-8)* ought not to cause any concerns at that stage*.*
4. An application pursuant to the Model Law must contain, among others things:

“(a) A certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or

(b) A certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or

(c) In the absence of evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative.” (Article 15(2)(a)-(c))”

1. And will be recognised if:

“(a) The foreign proceeding is a proceeding within the meaning of subparagraph (a) of article 2; [*a collective insolvency proceeding*]

(b) The foreign representative applying for recognition is a person or body within the meaning of subparagraph (d) of article 2; [*as a Director/Trustee of Efwon Delaware would be*]

(c) The application meets the requirements of paragraph 2 of article 15; and

(d) The application has been submitted to the court referred to in article 4 [*the courts with jurisdiction in the US to hear such proceedings*].”[[9]](#footnote-9)

1. The effect of recognition would be that, among other things, the commencement or continuation of individual actions or proceedings concerning the assets, rights, obligations or liabilities of Efwon Romania and Efwon England could be stayed (including the litigation by the Drivers)[[10]](#footnote-10) and the US Director/Trustee would be entitled to relief. The relief that would be sought in this case is that the United States Trustee be entrusted with the administration of Efwon England Romania’s assets (so that they could effect the Efwon Romania share sale).
2. Although there are now no actions, insolvency or otherwise commenced against Efwon England, there are likely to be by the time the US Chapter 11 order is made. As discussed above, if by the time of the enforcement of the US order such proceedings have been initiated then the US foreign representative needs to seek assistance before the English courts in effecting the US order in the course of those proceedings.
3. If proceedings have not by then been initiated, however, then it is worth it for Efwon England management to consider debtor in possession insolvency proceedings to give Efwon Engand some breathing space until the share transfer in Romania can take place (such as by putting the company into Administration under paragraph 3, Schedule B1, UK Insolvency Act 1986). It is important that Efwon Engand continues to function normally so that payments to the US syndicate of banks could be restarted as soon as possible.

**The impact of Brexit**

1. After the Brexit transitional period ends on 11PM on 31 December 2020, the benefit of the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (“EIR Recast”) between the UK and the EU is lost in respect of insolvency proceedings commenced after that period. However, the EIR Recast will continue to apply to insolvencies, where the Main Proceedings were opened prior to the expiry of the transitional period. In effect, there will no changes to those proceedings and the rules regarding the applicable law, jurisdiction and automatic recognition will continue to apply unaffected.
2. The Insolvency (Amendment) (EU Exit) Regulations 2019 (SI 2019/46 ("Exit Regulations") retain the existing jurisdiction in the UK under the EIR Recast, reinforcing the position that the UK courts will largely continue to apply the EIR Recast to insolvencies opened prior to the end of the transition period without any changes (Regulation 4).
3. It is not envisioned that any of the above would trouble a US Chapter 11 strategy, however, as we would be seeking enforcement of a US Order and recognition of a US trustee which would be entirely governed by the Model Law, both in the UK and in Romania, as set out previously (not the EIR Recast).
4. We should therefore categorically state that in proceedings by way of a Chapter 11 there would be no reason to have recourse to the EIR Recast. As relief, or, assistance enforcing the eventual Chapter 11 order will require use of the Model Law, it will not be necessary to have regard to the EIR recast in Romania, or, England.

**Effecting the deal**

1. Once the Trustee has obtained recognition in Romania they can seek to offer KuasaNas for fair value a 51% share in Efwon Romania. The value of that 51% is likely to be significant notwithstanding its debts to Efwon England. The license is worth a considerable amount and Efwon Romania had been servicing its debts subject to the recent tragedy regarding the Drivers. You have in fact instructed that the 2015-2017 seasons went well with the team climbing through the rankings, ultimately reaching 6th place and obtaining sufficient income to make more repayments. While KuasaNas will require an audit and valuation as a going concern, 51% of the shares in the company appears likely to be valued in the 100s of millions.
2. A portion of the sums acquired from the sale of the shares would need to be allocated to act as security in the Romanian Court proceedings (eg. by paying it into Court to satisfy any judgment debt that is ordered), or, by having it held in a trust account under the joint signatures of the parties’ Counsel in the Romanian litigation. That would go some way towards obtaining the release of the freezing order and assuaging the Drivers (potential creditors of Efwon Romania) in respect of the competing insolvency proceedings.
3. The rest of the funds obtained can be used to continue to service the company’s debts to Efwon Engand, which would then be in a position to service its debts to Efwon Delaware and the Monegasque creditor. That would then clear the way for Efwon Romania to migrate its entire business to Malaysia. That could be effected by winding up the affairs of the company in Romania and transferring the assets to Malaysia, or, by transferring the company itself to Malaysia, if that is possible under Romanian law. From your instructions, the only debts of the company are those to Efwon England and sundry creditors. So, as long as the successor Malaysian company is seized of that same debt there is no prejudice to creditors. As we have set out above the insolvency proceedings and the freezing order of the Drivers would have been dealt with by paying funds into court/ a trust account in the event litigation goes against Efwon Romania.
4. Having set out above how we believe the matter could possible be handled if a Chapter 11 is opened, as you have suggested, it is our advice that we do not pursue a Chapter 11. Although the reorganization of the group can potentially be dealt with in that manner, it is not the most cost effective or rapid solution.
5. Additionally, under the Model Law, domestic proceedings take precedence over foreign ones (which a Chapter 11 would be). So, the recognition of US proceedings would not prevent local creditors from initiating or continuing collective insolvency proceedings commenced in Romania[[11]](#footnote-11) and the relief available to the US Trustee/ Director would be subject to compliance with Romania’s procedural requirements[[12]](#footnote-12) as well as to the protection of local creditors and other interested parties against undue prejudice[[13]](#footnote-13). The Drivers, with their ongoing litigation, their freezing order and their insolvency proceedings (which by then would be before the Romanian court) would be in the driver’s seat, so to speak. The recognition of the US Trustee and enforcement of the US order in the face of aforesaid proceedings would be a much less straight forward prospect. The Model Law also preserves the possibility of excluding or limiting any action in favour of foreign proceedings based on public policy although that exception is not often used[[14]](#footnote-14).
6. Additionally, seeking assistance via the Model Law in England and Romania in respect of the US order will be further complicated by the fact that a US trustee in such a position does not qualify as acting in furtherance of a foreign main, or, non-main proceedings, which is a requirement of recognition and assistance under the Model Law (see Article 17). A foreign main-proceedings is one which takes place in the State where the debtor has its COMI. A foreign non-main proceeding is one other than a foreign main proceeding, taking place in a State where the debtor has an establishment[[15]](#footnote-15). An Establishment is any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services[[16]](#footnote-16). As the US foreign representative will ***not*** be able to certify that either of the foregoing is the case, it is very likely that assistance under the Model Law will not be granted to them.
7. And finally, from a practical perspective, given that Efwon Romania is the lynchpin in prying the group out of financial distress, we do not feel that it is advisable to pursue a group restructuring in the United States of America to solve what is in our view a misconceived initiation of insolvency proceedings in Romania. When all of the above is combined with the potential cost, delay and vagaries of the domestication of the US order (in Romania in particular but also in England), it is simply not the *best* solution.

**Our advised strategy**

1. Our advice is that a more efficient and effective use of the group’s resources would be to first set aside the insolvency proceedings which have been initiated in respect of Efwon Romania on the basis that the company is not insolvent and that the Drivers are not its creditors. Romania’s insolvency Law No. 85/2014 regarding preventing insolvency and insolvency proceedings (“the Insolvency Code”) provides that a debtor is only insolvent when it has insufficient funds to pay its certain, liquid and due debts[[17]](#footnote-17).
2. Furthermore, a “creditor” is not entitled to request the opening of insolvency proceedings unless its claim on the debtor's assets is certain, liquid and due for more than 60 days[[18]](#footnote-18). Neither is Efwon Romania insolvent nor are the Drivers technically creditors under Romanian legislation. The creditors simply do not have a quantifiable sum owing from Efwon Romania and there is no certainty that they ever will. It is therefore highly likely that Counsel will be able to obtain the setting aside of the Romanian filing for insolvency.
3. Following such setting aside, it is advised that Efwon Romania engage in one of Romania’s several pre-insolvency proceedings aimed at reaching a restructuring agreement with Efwon Engand, its main creditor. In this instance we believe Efwon Romania should proceed by way of the “preventive concordat” in the Insolvency Code[[19]](#footnote-19). Although it would have been possible, with the setting aside of the insolvency proceedings in Romania, to effect an out of court workout, the fact is that the freezing order obtained by the Drivers will be more difficult to deal with than the flawed filing for insolvency and a preventive concordat offers a very wide, albeit temporary, moratorium (as discussed further below) that would give Efwon Romania the leverage to dispose of the freezing order and finalise a deal with KuasaNas.
4. To be absolutely clear, only one insolvency proceeding will be necessary in this case; that is, the Preventive Concordat.

**The Preventive Concordat**

1. A preventive concordat is an agreement between a debtor in financial difficulty (subject to art. 16 of the Insolvency Code which is not relevant in the present case) and creditors that hold at least 75% of accepted and undisputed value of claims. The concordat is ultimately confirmed by a Romanian syndic judge. The proceedings must be opened at the request of Efwon Romania[[20]](#footnote-20) proposing a workout and recovery plan with the aim of covering creditors’ claims and carrying with it the creditor’s support. One of the major benefits of the approval of a preventive concordat is that an insolvency procedure cannot be opened against the debtor during the period of negotiation.
2. The agreement (or, the concord) put forward in this case, is as similarly contemplated if we had initiated a Chapter 11. Efwon Romania will offer KuasaNas for fair value a 51% share in Efwon Romania. As we have said previously the value of that 51% is likely to be significant notwithstanding its debts to Efwon England. The license is worth a considerable amount and Efwon Romania had been servicing its debts subject to the freezing order obtained by the Drivers. As the 2015-2017 seasons went well with the team climbing through the rankings, ultimately reaching 6th place and obtaining sufficient income to make more repayments there is also *some* cash available. While KuasaNas will require an audit and valuation of Efwon Romania, 51% of the shares in the company appears likely to be valued in the 100s of Millions (US). Your instructions are that Efwon England, as creditor, is in agreement with the proposal.
3. To obtain the release of the freezing order, our suggestion is to pay a certain amount of funds obtained into the Romanian Court, or, into a trust account under the joint signatures of both parties’ Counsel. If the litigation does not go in Efwon Romania’s favour the funds will be used to satisfy the judgment debt and if it does, the funds will be recouped by Efwon Romania. Efwon England and Romania have some leverage available to them in structuring such a deal with the Drivers as Efwon England ranks as a preferential creditor[[21]](#footnote-21). Given how large Efwon Romania’s debt is to Efwon England there is likely to be very little left, if anything, if the company were to be wound up and the Drivers were to take their chances in the waterfall of priorities. It is on that basis that they are very likely to agree to voluntarily release their freezing order if a certain manageable sum[[22]](#footnote-22) is paid into court or into a trust account as suggested. Additionally, the moratorium that the preventive concordat offers will make it that much clearer that a deal, in the circumstances, is in the Drivers’ favour.
4. Because a preventive concordat is essentially a court driven process, the Romanian syndic Judge has the following responsibilities in the process[[23]](#footnote-23):
   1. to appoint the interim concordat administrator;
   2. to approve, at the request of the concordat administrator, the preventive concordat;
   3. to ascertain, at the request of any unsigned creditor of the preventive arrangement, the fulfillment of the conditions required to be registered on the list of creditors who have adhered to the preventive arrangement;
   4. to order by conclusion, according to the provisions of art. 18, the temporary suspension of the forced executions against the debtor, based on the offer of preventive composition formulated by the debtor and sent to the creditors;
   5. to judge the actions in nullity and in resolution of the preventive concordat.
5. The procedure functions by Efwon Romania, as a debtor in financial difficulty, submitting to the competent court a request to open the preventive concordat[[24]](#footnote-24). By that request, the debtor proposes an individual to act as the temporary concordat administrator among the insolvency practitioners authorized according to the law. The syndic judge then appoints the provisional concordat administrator[[25]](#footnote-25) by executory conclusion and within 30 days from his appointment, the concordat administrator elaborates, together with the debtor, the list of creditors and the preventive concordat offer[[26]](#footnote-26). In this case, the creditors would be Efwon Engand and the other sundry creditors of the business. The Drivers do not have a claim pursuant to Romanian law, as set out above, and are therefore not creditors.
6. Notice of the preventive composition agreement is then to be given by the provisional composition administrator to the creditors by means of fast communication ensuring the possibility of confirming its receipt[[27]](#footnote-27). The preventive composition offer must then be submitted pursuant to the filing by Efwon Romania and to the registry of the court, where it will be registered in a special register.
7. The preventive composition offer sent to Efwon Romania’s creditors will also include the draft preventive agreement[[28]](#footnote-28), to which must be attached Efwon Romania’s statement regarding its financial situation as well as the list of known creditors, including those whose claims are challenged in whole or in part[[29]](#footnote-29). In the circumstances, the considerable debt to Efwon England will be accepted.
8. The draft preventive composition must set out in detail the following[[30]](#footnote-30):
   1. the analytical situation of Efwon Romania's assets and liabilities, certified by an accounting expert or, as the case may be, audited by an auditor authorized by law;
   2. the causes of the financial difficulty (in this case the Driver’s litigation and the lack of a sponsor) and, if applicable, the measures taken by Efwon Romania to overcome it until the submission of the final preventive composition offer (in this case the proposal to sell 51% of the shares of Efwon Romania to KuasaNas, relocate the company to Malaysia and deposit a sum into court to satisfy any judgment debt that is ordered by the Drivers);
   3. the projection of the financial-accounting evolution for the next 24 months.
9. The draft preventive arrangement must include a recovery plan, which provides for at least the following measures[[31]](#footnote-31):
   1. reorganization of Efwon Romania’s activity, through measures such as: restructuring the Efwon Romania’s management, modification of the functional structure, reduction of staff or any other measures considered necessary;
   2. the ways in which Efwon Romania intends to overcome the state of financial difficulty.
   3. in the case of contracts whose maturity exceeds the term of 24 months provided for the realization of the composition agreement or of those for which payment rescheduling is proposed outside this period, after closing the composition procedure, these payments will continue according to the resulting contracts.
   4. The term for the satisfaction of the receivables established by the composition agreement is 24 months from the date of its approval by executory decision, with the possibility of extension by 12 months. in the first year it is mandatory to pay at least 20% of the value of the receivables established by the composition. In the present case this should not be a difficulty if KuasaNas is able to sponsor purchase the 51% equity in the team.
10. To exercise the creditors' vote on the draft preventive composition agreement, Efwon Romania may organize one or more meetings, collective or individual, of negotiation with the creditors, in the presence of the composition administrator proposed by the debtor and these meetings, or, negotiations may must settle the final preventive composition (for voting) within 60 calendar days[[32]](#footnote-32). We will aim to settle the draft much quicker than that (our hope is within 7-14 days) as speed is key. The precautionary composition is considered approved by the creditors if the votes of the creditors are met, which represent at least 75% of the value of the accepted and uncontested claims[[33]](#footnote-33). After the approval of the concordat by the creditors, the concordat administrator requests the syndic judge to approve the preventive concordat. For approval, the syndic judge verifies the cumulative fulfillment of the following conditions[[34]](#footnote-34):
    1. the value of the disputed and / or disputed receivables does not exceed 25% of the credit mass (which is not the case);
    2. the preventive arrangement was approved by the creditors which represents at least 75% of the value of the accepted and uncontested receivables (we do not envision this being a problem either for obvious reasons).
11. The syndic judge then approves the preventive concordat by a decision pronounced in the council chamber, urgently and especially, after summoning and listening to the concordat administrator[[35]](#footnote-35). Importantly, from the date of communication of the decision approving the preventive agreement the very wide moratorium comes into effect:
    1. individual prosecutions by the signatory creditors on the debtor are suspended by law[[36]](#footnote-36);
    2. the prescription of the rights of creditors to request the forced execution of claims against the debtor[[37]](#footnote-37) are stayed.
    3. insolvency procedures towards the debtor cannot be opened[[38]](#footnote-38).
    4. Any creditor who obtains an enforceable title over the debtor during the procedure may file a request to adhere to the composition agreement or may recover his claim by any other means provided by law[[39]](#footnote-39).
12. The above moratorium, as we have said, is what will add the last bit of motivation to the Drivers to agree to accept a payment into court in exchange for the release of the freezing order. This will ensure that another freezing order does not suddenly appear when the moratorium ends and it is a proposal that is unlikely to be rejected as the moratorium means that the freezing order must necessarily go in the short term anyway.

**The European Directive 2019/1023 on preventive restructuring framework**

1. There is to be considered the fact that Romania would have fully implemented the European Directive 2019/1023 on preventive restructuring framework (“the Directive”) as of early 2020. On 20 June 2019, the European Parliament and the Council will publish in the Official Journal of the European Union the text of the Directive. One of the main purposes of the Directive is to introduce a preventive restructuring framework available for debtors in financial difficulties when there is a likelihood of insolvency, with a view to preventing the insolvency and ensuring the viability of the debtor[[40]](#footnote-40). Notwithstanding that the Directive will not be implemented in Romania until early 2020 we do have some insight into the new rules to be implemented and whether it would be worth waiting for the Directive’s implementation in Romania to effect the present restructuring of the Efwon group.
2. The Directive mandates member states to introduce a minimum standard framework for preventive restructuring available to debtors in financial difficulty and to provide measures to increase the efficiency of restructuring procedures, including by having those measures take place outside of court[[41]](#footnote-41). These new standards attempt to move EU Member States further in the direction of debtor-in-possession-type insolvency regimes such as chapter 11 and Schemes of Arrangement in the United Kingdom (and other common law jurisdictions).
3. Key elements of the procedure envisaged by the Directive include: (a) debtors remaining in possession of their assets and day-to-day operation of their business[[42]](#footnote-42); (b) a stay of individual enforcement actions[[43]](#footnote-43); (c) the ability to propose a restructuring plan that includes a cross-class cram-down mechanism whereby the plan is imposed on dissenting creditors in a class (holding no less than 25 percent of claims in that class) and across classes (subject to certain protections) [[44]](#footnote-44); and (d) protection for new financing and other restructuring-related transactions[[45]](#footnote-45).
4. Notwithstanding the above articles of the Directive, in our view, there is not much to recommend delaying the Efwon restructuring so that the Directive could be implemented in Romania. The fact is that Romania already has a debtor in possession procedure for reorganization which, as it stands, can effect the proposed restructuring relatively quickly (that is, before the Directive is implemented even) as the only creditor of note is Efwon England, another group member. The preventive composition also has the benefit of a very extensive moratorium[[46]](#footnote-46). Although it is a court driven process, we favour the speed and advantage of a quick preventive composition permitting the restructuring to be completed well in time for the next F1 season as opposed to waiting for the Directive which offers only the marginal advantage of an entirely out of court workout in the medium term.
5. Unlike EU Regulations, EU Directives do not have automatic effect and so Member States must implement the Restructuring Directive into national law by 17 July 2021, subject to a one-year extension; further delay therefore is not out of the question.

**A note on the EIR Recast**

1. Although the EIR recast would not have been relevant in a Chapter 11, it will be relevant when opening Romanian Insolvency proceedings. The EIR Recast creates a framework for resolving insolvencies in the European Union, particularly among EU member states. Although national legislatures retain the power to decide on the content of insolvency proceedings (for example, the ranking of claims, rules on directors’ liability, available restructuring options), issues of jurisdiction[[47]](#footnote-47), applicable law[[48]](#footnote-48), enforcement[[49]](#footnote-49) and recognition[[50]](#footnote-50), cooperation and communication between Insolvency Practitioners[[51]](#footnote-51) and courts, are largely harmonised through the mandatory EU law, laid down in the EIR Recast.
2. According to Article 1 of the EIR Recast (“Scope”), its scope is as wide as public collective proceedings, including interim proceedings, which are based on laws relating to insolvency and in which, for the purposes of rescue, adjustment of debt, reorganisation or liquidation:
   1. a debtor is totally or partially divested of its assets and an insolvency practitioner is appointed;
   2. the assets and affairs of a debtor are subject to control or supervision by a court; or
   3. a temporary stay of individual enforcement proceedings is granted by a court or by operation of law, in order to allow for negotiations between the debtor and its creditors. The proceedings referred to in Article 1 are listed in Annex A to the EIR Recast[[52]](#footnote-52).
3. Just from that article alone it is clear that the EIR Recast extends not only to “traditional” liquidation-oriented procedures, but also to proceedings aimed at rescuing the debtor from financial distress. Annex A of EIR Recast, which contains an exhaustive list of the proceedings covered, includes the Romanian Preventive Concordat. That therefore means that the EIR Recast applies without any further examination by the Romanian courts to Preventive Concordats.
4. Upon Efwon Romania submitting a request for a Preventive Concordat it will have to inform the court, consistent with article 3(1) of the EIR Recast, that it is seeking to open Main insolvency proceedings as its center of main interests (“COMI”) is Romania. Such proceedings would have universal scope and aim to encompass all of Efwon Romania’s assets. The EIR Recast allows for the opening of secondary proceedings, however, it is not anticipated that this will be required as Efwon Romania has no “establishment”[[53]](#footnote-53) in any other EU Member State; a requirement for the opening of such proceedings[[54]](#footnote-54).
5. The EIR Recast defines COMI as the place where the debtor conducts the administration of its interests on a regular basis, and which is ascertainable by third parties (Article 3(1)). Given Efwon Romania is a going concern having employees and other assets relevant to the F1 business in Romania there could be no argument that its COMI is not located in Romania and that it is simply a “letter box” company. If further evidence of that is required, the Drivers, potential creditors, brought proceedings in Romania and sought to seize assets there. They have clearly identified Efwon Romania’s COMI as being in Romania.

1. It is not expected, following the opening of main insolvency proceedings that the EIR Recast will play a much greater role in the Romanian proceedings. The applicable insolvency law, the COMI being in Romania, will be Romanian law according to the EIR Recast[[55]](#footnote-55). Additionally, from your instructions and our strategy set out above, there does not appear to be any reason to have recourse to the important cross-border tools which the EIR Recast provides.

**Exposure/ impediments to this advice**

1. One of the main weaknesses of our strategy relates to the financial state of Efwon Romania. While you have instructed us generally that the company, prior to the insolvency filing, was paying its debts etc., management has not yet supplied their most recent financial statements. Such statements would enable a proper valuation of the company and in particular reveal the amount of cash the company is holding. As we have said, cash will be required to be paid into court for the benefit of the Drivers’ litigation.
2. Tangentially, a proper valuation of the company is required to support any deal with KuasaNas; the higher the value of the company the more capital that will be injected in a share sale. If the company is valued very highly then Efwon Romania will be in a better negotiating positing when paying funds into court following the share sale. If, however, the company’s value is relatively low (which seems unlikely at this point) then a loan will be required to assist in the negotiations with the Drivers.
3. Additionally, we do not know how much the Drivers were paid by Efwon Romania or how much they made from sponsors etc. That information is critical in evaluating the Drivers’ claim in tort which would also inform the negotiation with respect to the sum which should be paid into court. If, for example, the Drivers each made as much as Lewis Hamilton did last year (US$40-50M) and they are completely permanently debilitated by the accident (a worst-case scenario), then Efwon Romania could be ordered to pay a very considerable sum if they lose. Such a sum would likely be much more than the present value of the company, in fact.
4. Conversely, if the Drivers, relatively, are not paid very highly (e.g. US$1M a year) and they are not permanently incapacitated by the accident (a best case scenario) then their claim is likely to be much smaller and the funds required to be paid into court will be much less. In that regard, you have not been able to supply us with the Drivers’ filed claim and the details of the freezing order that was made. Those documents will be instructive in unearthing the exact nature of the litigation on the ground in Romania which, as we have said, will assist in the negotiations to release the freezing order. Presently, we have only been able to form a general view of what is actually taking place on the ground, however, a more detailed look at the circumstances is required by our Romanian counsel.
5. If KuasaNas does not obtain Malaysian regulatory permission to purchase the shares in Efwon Romania then this advice will become moot and another strategy will have to be developed to deal with the financial difficulties threatening the group. That uncertainty, therefore, also obviously causes significant exposure for the Efwon group and alternative buyers should be pursued until the situation is clearer with KuasaNas.
6. We hope that we have answered most of your questions to us and are open to discussing with you any and all of the above when that is convenient. As you are aware, time is of the essence, so we hope to hear from you soon in any event.
7. We thank you for considering us.

Yours faithfully,

**Yuri Saunders**

1. U.S. Bankruptcy Code Title 11: § 362 [↑](#footnote-ref-1)
2. U.S. Bankruptcy Code Title 11: § 1129 [↑](#footnote-ref-2)
3. U.S. Bankruptcy Code Title 11: § 1129 [↑](#footnote-ref-3)
4. U.S. Bankruptcy Code Title 11: § 1129 [↑](#footnote-ref-4)
5. U.S. Bankruptcy Code Title 11: § 1129b [↑](#footnote-ref-5)
6. In re Continental Vending Machine Corp., 517 F.2d 997 (2d. Cir. 1975) (approving substantive

   consolidation pursuant to a reorganization plan). [↑](#footnote-ref-6)
7. UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009) [↑](#footnote-ref-7)
8. [2020] EWHC 123 (Ch) (27 January 2020) [↑](#footnote-ref-8)
9. UNCITRAL Model Law; Article 17(1)(a)-(d) [↑](#footnote-ref-9)
10. UNCITRAL Model Law; Article 20(1)(a) [↑](#footnote-ref-10)
11. UNCITRAL Model Law on Cross-Border Insolvency; art 22 [↑](#footnote-ref-11)
12. *Idem*, Art 19(2). [↑](#footnote-ref-12)
13. *Idem*, Art 22. [↑](#footnote-ref-13)
14. *Idem*, Art 6 [↑](#footnote-ref-14)
15. *Idem*, Art 2 (b) and (c) [↑](#footnote-ref-15)
16. *Idem*, Art 2 (f) [↑](#footnote-ref-16)
17. Law No. 85/2014; art 5(29) - Insolvency is that state of the debtor's patrimony which is characterized by the insufficiency of the funds available for the payment of certain, liquid and due debts, as follows:

    a) the insolvency of the debtor is presumed when, after 60 days from the due date, he has not paid his debt to the creditor; the presumption is relative;

    b) the insolvency is imminent when it is proved that the debtor will not be able to pay at maturity the due debts committed, with the funds available at the due date; [↑](#footnote-ref-17)
18. Law No. 85/2014; art 5(20) [↑](#footnote-ref-18)
19. Law No. 85/2014; Chapter III [↑](#footnote-ref-19)
20. Law No. 85/2014; art 16 [↑](#footnote-ref-20)
21. Law No. 85/2014; art 5(15), art 159 [↑](#footnote-ref-21)
22. Relative to the sum of the Drivers’ claim and the value of the cash reserves available to Efwon Romania following a share sale. [↑](#footnote-ref-22)
23. Law No. 85/2014; art 17 [↑](#footnote-ref-23)
24. Law No. 85/2014; art 23 [↑](#footnote-ref-24)
25. Law No. 85/2014; art 23 [↑](#footnote-ref-25)
26. Law No. 85/2014; art 23 [↑](#footnote-ref-26)
27. Law No. 85/2014; art 23 [↑](#footnote-ref-27)
28. Law No. 85/2014; art 23 [↑](#footnote-ref-28)
29. Law No. 85/2014; art 23 [↑](#footnote-ref-29)
30. Law No. 85/2014; art 24 [↑](#footnote-ref-30)
31. Law No. 85/2014; art 24 [↑](#footnote-ref-31)
32. Law No. 85/2014; art 26 [↑](#footnote-ref-32)
33. Law No. 85/2014; art 27 [↑](#footnote-ref-33)
34. Law No. 85/2014; art 28 [↑](#footnote-ref-34)
35. Law No. 85/2014; art 28 [↑](#footnote-ref-35)
36. Law No. 85/2014; art 29 [↑](#footnote-ref-36)
37. Law No. 85/2014; art 30 [↑](#footnote-ref-37)
38. Law No. 85/2014; art 31 [↑](#footnote-ref-38)
39. Law No. 85/2014; art 32 [↑](#footnote-ref-39)
40. Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019; art 1(a) [↑](#footnote-ref-40)
41. Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019; art 4 [↑](#footnote-ref-41)
42. Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019; art 5 [↑](#footnote-ref-42)
43. Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019; art 5 [↑](#footnote-ref-43)
44. Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019; art 5 [↑](#footnote-ref-44)
45. Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019; art 8 [↑](#footnote-ref-45)
46. See paras 42-43 above. [↑](#footnote-ref-46)
47. Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast); arts 3-4 [↑](#footnote-ref-47)
48. Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast); art 7 [↑](#footnote-ref-48)
49. Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast); art 32 [↑](#footnote-ref-49)
50. Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast); Chapter II [↑](#footnote-ref-50)
51. Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast); arts 41 and 74 [↑](#footnote-ref-51)
52. Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast); art 1 [↑](#footnote-ref-52)
53. Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast); art 2(10) - ‘establishment’ means any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets [↑](#footnote-ref-53)
54. Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast); art 3(2) [↑](#footnote-ref-54)
55. Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast); art 7 [↑](#footnote-ref-55)